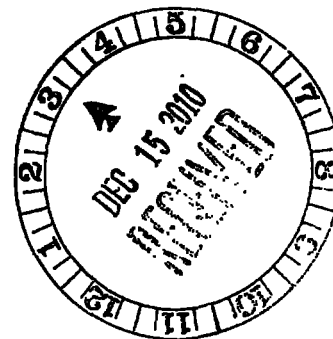


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BY HAND

December 15, 2010

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
DEC 16 2010
Part of
Public Record

RE: GNP RPLY INC. – ACQUISITION AND OPERATION)
EXEMPTION - REDMOND SPUR AND WOODINVILLE)
SUBDIVISION)

FD NO. 35407 228467

BNSF RAILWAY COMPANY – ABANDONMENT)
EXEMPTION – IN KING COUNTY, WA)

AB-6 (SUB. NO. 463X) 228468

BNSF RAILWAY COMPANY – ABANDONMENT)
EXEMPTION – IN KING COUNTY, WA)

AB-6 (SUB. NO. 465X) 228469

Dear Ms. Brown:

On behalf of GNP Rly Inc., I am enclosing for filing in the above-captioned proceedings the following documents:

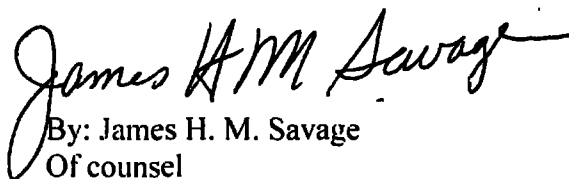
1. The Reply Comments of GNP Rly Public Version
2. The Reply Comments of GNP Rly Confidential Version
3. The Public Version of Exhibits supporting these comments
4. The Confidential Version and Highly Confidential Versions of Exhibits supporting these comments
5. A diskette containing both the Public and Confidential Versions of GNP Rly's comments

Please note that only the following lettered exhibits are marked confidential:
Exhibits K, N, and O. In addition, Exhibit H is marked "Highly Confidential" and contains information regarding the commitment of GNP's financial backer.

Thank you for your time and consideration.

Sincerely yours,

JOHN D. HEFFNER, PLLC


By: James H. M. Savage
Of counsel

Enc.

cc: All parties (w/enc.)

cc: All parties

PUBLIC VERSION

ORIGINAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

228467

STB FINANCE DOCKET NO. 35407



**GNP RLY INC.
-- ACQUISITION AND OPERATION EXEMPTION --
REDMOND SPUR AND WOODINVILLE SUBDIVISION**

228468

STB DOCKET NO. AB-6 (SUB NO. 463X)

**BNSF RAILWAY COMPANY
-ABANDONMENT EXEMPTION-
IN KING COUNTY, WA**

228469

STB DOCKET NO. AB-6 (SUB NO. 465X)

**BNSF RAILWAY COMPANY
-ABANDONMENT EXEMPTION-
IN KING COUNTY, WA**

**ENTERED
Office of Proceedings
DEC 16 2010
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Public Record**

REPLY COMMENTS OF GNP RLY INC.

Submitted By:

John D. Heffner
James H.M. Savage
John D. Heffner, PLLC
1750 K Street, N.W.
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(202) 296-3333

Counsel for Petitioner

Dated: December 15, 2010

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35407

**GNP RLY INC.
-- ACQUISITION AND OPERATION EXEMPTION --
REDMOND SPUR AND WOODINVILLE SUBDIVISION**

STB DOCKET NO. AB-6 (SUB NO. 463X)

**BNSF RAILWAY COMPANY
-ABANDONMENT EXEMPTION-
IN KING COUNTY, WA**

STB DOCKET NO. AB-6 (SUB NO. 465X)

**BNSF RAILWAY COMPANY
-ABANDONMENT EXEMPTION-
IN KING COUNTY, WA**

REPLY COMMENTS OF GNP RLY INC.

**I.
INTRODUCTION**

Pursuant to an order of the Surface Transportation Board served December 1, 2010, GNP Rly, Inc. ("GNP") files its Reply to the Comments previously submitted in the above-captioned proceedings on November 9, 2010. GNP asks the Board to grant the Petition for Exemption it filed on August 24, 2010, in Finance Docket No. 35407 so that it may acquire the residual common carrier

rights and obligations and reinstitute common carrier rail service on two lines of railroad¹ totaling 9.1 miles in length, formerly owned by the BNSF Railway Company (“BNSF”) and now owned by the Port of Seattle (“the Port”) and the City of Redmond (“Redmond”) in King County, WA, and designated for use as a rail trail by King County, WA.² The Lines consist of (1) the Redmond Spur extending from its connection with the former Woodinville Subdivision at MP 0.0 in Woodinville, WA, to its terminus in Redmond at MP 7.3 and (2) a short 1.8 mile-long segment of the Woodinville Subdivision from its junction with the Redmond Spur at MP 23.8 on the Woodinville Subdivision (or MP 0.0 on the Redmond Spur) to MP 22.0, all in Woodinville, WA. GNP also asks the Board to grant its simultaneously filed Petitions to Vacate or Partially Vacate two Notices of Interim Trail Use or Abandonment (“NITU”) issued in BNSF Railway Company- Abandonment Exemption -in King County, WA, STB Docket No. AB-6 (Sub-No. 463 and 465X),³ respectively, to allow the reactivation of these same two rail lines.

¹ Hereafter “the Lines”

² The Port owns the segment of the Redmond Spur between MP 0.0 and MP 3.4 at Woodinville and the 1.8 miles of the Woodinville Subdivision at issue here. Redmond owns the portion of the Redmond Spur inside the city limits between MP 3.4 and the end of the Line at MP 7.3.

³ GNP seeks to vacate the NITU for the Redmond Spur in Docket No. AB-6, Sub-No. 463X and to partially vacate the NITU for the 1.8 mile-long segment of the Woodinville Subdivision in Docket No. AB-6, Sub-No. 465X.

While both King County and Redmond acknowledge that the Lines are eligible for reactivation as common carrier railroads, they assert that this is neither the appropriate time or circumstances. They give no indication as to when or under what circumstances would be appropriate. *See*, discussion at pages 11 and 12, *infra*. Furthermore, King County fully admits through the deposition of its witness Pam Bissonnette that it lacks the ability and the intent to execute its responsibilities under the National Trails Act, the various transaction agreements, and its common carrier responsibilities acquired from BNSF. *See*, discussion at pages 41-42, *infra*.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This consolidated proceeding involves a plan by GNP to acquire the common carrier rights and obligations on and to restore active rail service over two short rail lines that have been out of service and designated for use as a trail for the past several years. GNP is an existing Board authorized class III short line railroad common carrier.⁴ GNP currently operates the adjoining trackage from MP 23.8 in Woodinville north to MP 38.25 at Snohomish under an operating easement

⁴ *See, GNP RLY Inc. – Acquisition and Operation Exemption – BNSF Railway Company*, STB Finance Docket No. 35213, STB served February 13, 2009.

acquired from BNSF in a *State of Maine* transaction authorized in February 2009 but consummated in December 2009.⁵

The written testimony of GNP Chairman of the Board and Chief Operating Officer Thomas Payne, attached as Exhibit A, indicates GNP is currently providing local freight service over the Freight Easement, is actively involved in soliciting substantial additional volumes of freight traffic for movement over the Freight Easement, is looking to initiate an excursion passenger service over that segment, and seeks in the longer term to provide common carrier commuter rail service over that segment. Payne VS at para. 2. As GNP explicitly indicated in its Petition for Exemption and Mr. Payne once again points out in his statement submitted here, GNP has been discussing restoration of service with the public agency parties to this proceeding but it has not reached any agreement covering its operations over the Lines. Payne VS at para. 3.

As background, BNSF originally received an exemption in 2008 from the Board enabling it to abandon the Redmond Spur utilizing the expedited abandonment procedures of 49 CFR 1152.50 applicable to rail lines that have been out of service for at least two years. BNSF Railway Company-Abandonment Exemption -in King County, WA, cited in note 3, supra. Also in 2008 BNSF sought and received an individual exemption under 49 U.S.C. 10502 from the

⁵ This segment shall be referred to as “the Freight Easement.”

abandonment provisions of 49 U.S.C. 10903 applicable to actively used rail lines to abandon the segment of the Woodinville Subdivision from MP 23.8 south to MP 11.25 at Bellevue. BNSF Railway Company-Abandonment Exemption -in King County, WA, cited in note 3, supra. Pursuant to those decisions, BNSF discontinued all rail service and subsequently conveyed the track and rights-of-way on both lines to the Port.

On September 18, 2008, King County asked the Board to issue a Notice of Interim Trail Use (“NITU”) for each of the two lines. In its letter requesting the issuance of a NITU, King County stated its willingness to accept all liabilities associated with the two lines and acknowledged that such trail use is subject to future reconstruction and reactivation of rail service. *See*, Request of King County, Washington for Interim Trail Use Pursuant to 49 CFR 1152.29 at 2. Thereafter, King County sought and received a Board exemption authorizing it to acquire BNSF’s common carrier rights and obligations including the right to restart rail service.⁶ In authorizing that transaction, the Board explicitly put the County on notice that rail service could be restored at any time, stating:

“The threshold issue in this case is whether it is permissible under the Trails Act for a trail sponsor to acquire from a railroad the right to reactivate rail service over a railbanked line even if there is no evidence that the trail sponsor intends to exercise that right... But as previously noted, the right to reactivate a railbanked line is not an

⁶ King County, WA-Acquisition Exemption-BNSF Railway Company, STB Finance Docket No. 35148, STB served Sept. 18, 2009.

exclusive right. [citation omitted]. While the parties' agreement would transfer to King County BNSF's opportunity to provide rail service, it would not preclude *any other service provider* [emphasis supplied] from seeking Board authorization to restore active rail service on all or parts of the railbanked segments in the future if King County does not exercise its right to reinstate rail service. [citations omitted]. Accordingly, regardless of the parties' intentions, a bona fide petitioner, under appropriate circumstances, may request the NITU to be vacated to permit reactivation of the line for continued rail service. [citations omitted]. Thus, the parties' plans have not been shown to be inconsistent with the railbanking purpose of the Trails Act." King County-Acquisition Exemption, *supra* at 3-4.

In order to undertake and consummate the various property acquisition and trail use transactions involving the Lines, the four Washington State public agencies participating in this proceeding entered into five separate agreements during the period from May 3, 2008 through December 18, 2009. These documents delineate the rights and duties of King County as both the trail user and the holder of the common carrier and railroad reactivation rights conveyed by BNSF. The agreements include:

- The May 3, 2008 Interlocal Agreement between King County and the Port, in which King County unconditionally accepted all Railbanking Obligations of an interim trail user, including *sub nom*, all of those obligations relating to reactivation of freight rail use. King County further undertook the obligation to file for Interim Trail User status with the Board and to receive the [freight] reactivation rights at

Closing of title. See, Interlocal Agreement, annexed hereto as GNP Reply Exhibit B at pp. 3-4.

- The May 12, 2008 Purchase and Sale Agreement (PSA) between BNSF, the Port and King County which required King County to obtain Board approval of the transfer of the right and/or obligation to restore rail freight service over the Railbanked Portion [including the subject Lines] from BNSF to King County. See, King County Exhibit 12 at Section 8.1(c), page 14 thereof.
- The November 5, 2009 five party Memorandum of Understanding (MOU) among the Port, Sound Transit, King County and two public utilities which provides at Section 3.3 thereof, “The parties recognize that for any portion subject to railbanking, future local, regional or national transportation needs may require reconstruction and reactivation of the right-of-way for freight rail service.” See, MOU, annexed hereto as GNP Reply Exhibit C.
- The December 18, 2009 Trail Use Agreement between BNSF and King County, in which King County expressly acknowledges that, “pursuant to the *requirements* of the Railbanking Legislation, freight service may be reactivated on the three segments of the Subdivision [the Redmond Spur and two segments of the Woodinville

Subdivision, including that portion of that Subdivision for which GNP is seeking reactivation authority herein] and the King County *must* make the three segments of the Subdivision available for reactivation of freight service.” See, GNP Reply Exhibit D at page 1. [Emphasis supplied].

- The December 18, 2009 Public Multipurpose Easement (PME) granted by the Port to King County which obligates the Parties, “[W]here so required, [to] make available some or all of their respective interests in the Property to accommodate reactivated freight rail service with other uses of the Property.” See, GNP Reply Exhibit E at Section 4.1.1., page 12 thereof.

Recently, a demand for rail service has developed on the Lines that prompted GNP to file these two Petitions on August 24, 2010. Mr. Payne identified in his previous verified statement two customers that have asked GNP to serve them: Drywall Distributors, Inc. and Building Specialties. GNP’s Petition for Exemption also included a statement by the owner of an industrial park, Wallace/Knutsen L.L.C., where Building Specialties is located, supporting the need for rail service at its facility. Since August 24, 2010, no fewer than seven (7) additional parties have submitted verified statements and letters supporting GNP’s reinstitution of rail service. Of the additional parties, three (3) parties, Woodinville

Lumber, Steeler, Inc. and UniSea, have requested freight service on the Redmond Spur. BNSF is working with GNP to develop substantial new traffic on the adjoining Freight Easement. Payne VS at para. 12. Waste Management, Inc., has filed a verified letter stating that it proposes to locate a facility on the Freight Easement that would handle about 3,640 cars of containerized waste per year. GNP is also working aggressively with a firm that would move a similar amount of aggregate traffic. Payne VS at para. 5.

On September 15, 2010, the Board served a decision⁷ acknowledging receipt of both the Petition for Exemption and the Petitions to Vacate Trails Use and initially setting October 20, and November 19, 2010, as the deadlines for comments and reply comments, respectively. Subsequently, the Board extended those deadlines to November 9 and December 9, respectively, at the joint request of both King County and GNP to accommodate the City of Redmond's discovery requests. Thereafter, the Board again⁸ and with the consent of all parties extended the deadline for GNP's Reply Comments until December 15, 2010.

Five parties filed substantive responses to the Board's request for comments: King County, Redmond, Central Puget Sound Regional Transit Authority (commonly known as "Sound Transit"), BNSF, and the Rails-to-Trails

⁷ Cited as The September 15 Decision.

⁸ The Board served an order on December 1, 2010, extending the deadline for GNP's Reply Comments.

Conservancy (“RTC”). In addition, the Port filed a letter comment dated December 2, 2010, supporting the position taken by the other public agency participants here. GNP will respond to each below first by highlighting and replying to assertions collectively made by several parties and then by addressing certain comments specific to an individual party.

ARGUMENT

As GNP stated in its Petition for Exemption and the Board acknowledged in its September 15 Decision, this Petition presents an issue of first impression: whether the Board must approve a request by an authorized rail carrier to restore to active common carrier service a rail line that has been converted to trail use under the National Trails Act, 16 U.S.C. 1247(d) (“the Trails Act”) and the Board’s implementing regulations at 49 CFR 1152.29 where the petitioning carrier does not own the right-of-way or have the common carrier rights to reactivate the service.

Before addressing concerns of the various parties, GNP feels compelled to note two points on which *all* or most parties appear to agree. First, none of the parties dispute that a rail trail may be restored to rail service at any time in the future. King County, concedes “... it is true that a trail use is an ‘interim’ use and that a trail user must be prepared to ‘step aside’ when rail service is restored.” King County at 4. Later in its comments, King County states, “it is not opposed to freight rail service on the right-of-way, and further recognizes that at the

appropriate time and in the appropriate circumstances the interim trail use must give way to Board-approved rail service. However, GNP's proposal describes neither that time nor those circumstances." *Id.* at 46. But King County fails to state when is the *right* time and when are the *right* circumstances. And who better than GNP to operate the Lines? King County's comments conflict with its September 22, 2008, common carrier obligation acquisition petition which includes as Exhibits a MultiPurpose Easement with the Port and a Trail Use Agreement with BNSF, both of which reference an unconditional obligation to affirmatively cooperate with a reactivation request.⁹ Redmond, although more forthright in acknowledging the obligations of an interim trail user, nevertheless also improperly tries to condition its duty to cooperate with reactivation upon the applicant's compliance with certain unspecified prerequisites. "[It] understands that every railbanked right of way is subject to future restoration of rail service. Redmond...is prepared to step aside in the unlikely event that a carrier submits a

⁹ See, Recital 8 and in Section 4 of the Easement attached here as Exhibit D. The pertinent part of the Trail Use Agreement attached here as Exhibit E states:

"the County acknowledges that, pursuant to the requirements of the Railbanking Legislation, freight service may be reactivated on the three segments of the Subdivision and the County must make the three segments of the Subdivision available for such reactivation of freight service; and

"WHEREAS, subject to the request of the Port or other requests for service reactivation, the Parties intend that the County is also obtaining the right and obligation to permit or effect reactivation, which has been approved by the STB, and pursuant thereto to permit the person requesting reactivation to take such steps as may be required to permit or effect that reactivation..."

credible proposal for reactivation of freight service, and the carrier pays for the use of Redmond's property." Redmond at 19. However, GNP's proposal is credible as it demonstrates below. BNSF's and RTC's comments likewise contain qualified recognition of the reactivation of service obligation.¹⁰ But the Board's regulations contain no such qualifications. *See*, 49 CFR 1152.29(a)(3) (stating that a rail banking request must include an acknowledgement that interim trail use is subject to the user's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service).

The second point upon which King County and GNP agree is that Board acquisition and operation authority is *permissive*. *See*, King County at 2, 35, and 51.¹¹ Certainly, Board authority does not create property rights that are not presently in existence. It merely authorizes a petitioner or applicant to undertake a transaction once it obtains the contractual ability to consummate that action.

That aside, GNP now responds to the principal assertions common to all or most of the comments filed by GNP's five principal opponents.

¹⁰ For example, BNSF asserts the ICC specifically found that interim trail use under the Trails Act is subject to reactivation of rail service by the owner of the right-of-way and not a third party" and RTC's comments note that "these interim trail use/railbanking agreements anticipate the possibility of rail service reactivation by the railroad or its assignee. BNSF at 6; RTC at 9.

¹¹ No other party questions GNP's assertion.

The STB can and should grant GNP's petition notwithstanding it lacks an ownership interest at the time of filing. As GNP stated in its Petition, this case presents the novel issue of whether the Board must approve a request by an authorized rail carrier to restore to active common carrier service a rail line that has been converted to trail use under the National Trails Act where the petitioning carrier does not own the right-of-way or have the common carrier rights to reactivate the service. GNP Petition at 6-7. Yet each and every one of GNP's opponents would have the Board reject its Petition for Exemption merely on the grounds that GNP lacked any ownership interest in the Lines at the time of filing.

Neither the National Trails Act provisions authorizing the conversion of rail lines authorized for abandonment to trail use nor the Board's regulations specifically address whether or not a railroad seeking to restore to active service a railbanked line must possess an ownership right before seeking operating authority and vacating the NITU. Indeed, King County itself concedes that very point, stating "[n]either the Trails Act nor the Board's regulations explicitly address how an abandoning railroad can exercise its right to reactivate freight service on a railbanked line." King County at 36. The regulations simply require the interim trail user to acknowledge that the right of way may be reconstructed and restored to active rail service. 49 CFR 1152.29(a)(3). The only other provision addressing reactivation in the context of an exempt abandonment is 49 CFR 1152.29(3) which

states “[i]f an application to construct and operate a rail line over the right-of-way is authorized...or exempted..., then the NITU will be vacated accordingly.” The handful of Board decisions¹² addressing the issue of whether the petitioning carrier *must* own an interest in the right-of-way or have the consent of the abandoning carrier or its successor are of scant instructive value. In the first place, BNSF, the abandoning carrier herein, has conveyed its reactivation rights to King County, which is likewise a non-owner. Second, lest it be forgotten, GNP, through its agreements with the Port of Seattle, already has acquired certain rights to use a 2.5 mile segment of the Redmond Spur. Third, the Redmond Spur is a stub-ended Line, accessible at present only from the contiguous trackage on which GNP holds full operating rights and the permanent freight easement. The Board must ask the opponents, if not GNP, then who would be in a foreseeable position to exercise the now dormant reactivation rights vested in King County pursuant to the Trails Act? The suppression of such reactivation rights here contravenes the public purpose Congress sought to achieve through enacting the Trails Act. If GNP’s request

¹² See, e.g., Rail Abandonments – Use of Rights of Rights-of-Way as Trails, 2 I.C.C.2d 591 (1986); Rail Abandonments – Supplemental Trails Act Procedures, 4 I.C.C.2d 152 (1987); Rail Abandonment – Trails Act – Policy Statement, 5 I.C.C.2d 371 (1989); Iowa Power-Const. Exempt-Council Bluffs, IA, 8 I.C.C.2d 858 (1990); N&W – Aban. St. Marys & Minister In Auglaize County, OH, 9 I.C.C.2d 1015 (1983); Georgia Great Southern-Abandon. & Discon. Of Service-GA, 6 S.T.B. 902, 906 (2003); R.J. Corman Railroad Company/Pennsylvania Lines Inc. – Acquisition and Operation Exemption – Line of Norfolk Southern Railway Company, STB Finance Docket No. 35143, STB served June 5, 2008; Missouri Pacific Railroad Company – Abandonment Exemption – In St. Louis County, MO, STB Docket No. AB-3 (Sub-No. 98x), STB served April 25, 1997; and Missouri Pacific Railroad Company – Abandonment Exemption – In Muskogee, McIntosh and Haskell Counties, OK, STB Docket No. AB-3 (Sub-No. 104x), STB served May 11, 2009.

were to be denied, then any nonrailway entity could establish a NITU with the intent of never reactivating rail service.

According to each of GNP's opponents, the Board cannot grant this Petition because the petitioner in each of the handful of service reactivation cases decided to date either had an ownership or possessory interest in the right of way or had obtained consent from the abandoning carrier to reactivate the line. For example, BNSF posits without citing any cases, "[a]s the Board and its predecessor, the Interstate Commerce Commission..., have consistently held, the Board cannot mandate the reactivation of rail service on a railbanked corridor without the acquiescence of the party holding the reactivation rights." BNSF at 6. BNSF then points out that all of the cases that GNP has cited in support of its request have one very significant feature, the entity seeking to reactivate either possessed the reactivation rights itself or had the acquiescence of the party with those rights. *Id.* In other words, GNP's opponents are arguing that the Board can't approve GNP's Petition because nobody has ever done it that way before! But they can't cite to any precedent or agency policy that *specifically prohibits* the Board from taking that action under these circumstances.

GNP's opponents attempt to argue by analogy, citing the Board's regulations covering short line railroad acquisition and operation exemptions. 49 CFR 1150.31(c) and 49 CFR 1150.41(c). No party cites any precedent specifically

stating that the Board's acquisition and operations regulations apply to the reactivation of a railbanked property. No party has cited any decision rejecting an acquisition or operation exemption filing solely for lack of an executed transaction agreement or the reasonable prospect of one. Nor has any party challenged the ICC's holding in Prairie Central Ry. Co.-Acquisition & Operation, 367 I.C.C. 884 , 885 (1983) that "the provisions of 49 U.S.C. 10505 [now 10502] do not require a demonstrated ability to consummate a transaction before an exemption may be granted." On the contrary, as King County has conceded and GNP has emphasized in its Petition, Board authority is *permissive* and issues of property rights and contract law are matters for determination under state law. King County at 35-6; GNP Petition for Exemption at 8.¹³

Contrary to assertions by several of GNP's opponents, GNP is not asking the Board to "condemn" Port-owned right of way for its use.¹⁴ It is merely asking the Board to authorize GNP's right to acquire an operating interest over a right of way

¹³ King County claims that Delaware & Hudson R.R. Corp.-Trackage Agreement Modification, 290 I.C.C. 103 (1953), cited by GNP for the proposition that commercial matters such as a party's contractual access rights to use a rail line are outside the Board's jurisdiction, supports dismissing GNP's Petition. King County's criticism of GNP's citation to that case is misplaced as requests for approval of trackage rights under 49 U.S.C. 11323 *require* [emphasis supplied] that the applicant furnish a copy of an executed agreement between the parties whereas an exemption for acquisition or operation authority contains no such requirement. *Cf.*, 49 CFR 1180.6(a) (7) (ii).

¹⁴ See, e.g., King at 3; Sound Transit at 9.

irrespective of when GNP concludes an arrangement for the use of the Lines with the property owner or owners.

King County uses circular reasoning to oppose GNP's Petition, while conceding rail service's precedence over trail use and the permissive nature of STB authority: "[a]lthough it is true that a trail use is an "interim" use and that a trail user must be prepared to 'step aside' when rail service is restored, the interim nature of a trail use does not mean, as GNP argues, that *any* [emphasis supplied] proposed rail carrier can push aside any trail user at any time....a trail user must 'step aside' only *after* a rail carrier has established its authority to operate on the corridor by either (1) being the abandoning railroad or its corporate successor, or (2) having obtained independent authority from the Board to operate on the corridor, being able to provide active rail service, *and* having obtained the consent of the abandoning railroad or its successor.

While King County and Redmond both concede there are situations where the trail user must step aside for restored common carrier freight rail service,¹⁵ they will not step aside for this particular rail carrier (GNP). Rather, the opponents have anointed themselves as the gatekeepers empowered to determine which carrier, if any, if ever, is so worthy as to be their chosen rail freight operator. In fact, any carrier selected by King County to fulfill its common carrier

¹⁵ See, discussion in GNP comments at 8-9, *supra*

responsibilities would have to make arrangements with GNP to reach BNSF. While GNP would provide King County or its designated carrier with an interchange, commercial arrangements between a captive short line railroad and the short line that provides access to the national rail system are frequently uneconomic.

A review of the transaction documents reveals that the *Port*, and not King County, owns most of the right of way that is the subject of this proceeding. King County is merely a nonexclusive trail use easement holder on the Port's (and Redmond's) property and would become a fellow easement holder upon GNP obtaining a rail operating easement over the Lines.

King County and Redmond next attempt to disqualify GNP on the grounds that the various agreements applicable to GNP operations over the Lines preclude it from operating common carrier freight service and common carrier commuter rail passenger service over the Lines and excursion passenger service on the Redmond Spur below MP 2.5. The evidence is to the contrary. GNP was careful to ensure that nothing in the agreements prohibited it from applying to reactivate the Lines. GNP welcomed the inclusion of amendments allowing reactivation with the cooperation of the Port and King County in GNP's agreements. Moreover, King County and Redmond have rebuffed GNP's persistent efforts both before and after filing its Petition to engage in meaningful discussions regarding the

appropriate time and circumstances for restoring service. *See, Payne VS* at para. 7.

King County asks and answers its own question “under what circumstances will the Board grant a carrier’s request to vacate a NITU to permit reactivation of rail service when the petitioning carrier does not own or have any other interest in the right of way with a blanket “under no circumstances.” It then suggests that the Board will not vacate trail use unless (1) the Petitioner has received Board operating authority, (2) is in a position to provide active rail service, and (3) has the consent of the abandoning railroad or its successor. King County at 39-40. But accepting King County’s proposition presents a “catch 22.” King County opposes vacating the NITU because GNP lacks operating authority and while likewise opposing GNP’s request for that authority. Ultimately, King County won’t consent to GNP making any use of the *Port’s* property! King County seems to forget that its only rights are those of a holder of a nonexclusive multipurpose easement and a common carrier obligation. Its statement ignores the plain language in King County-Acquisition Exemption, *supra*, at 3-4:

“the right to reactivate a railbanked line is not an exclusive right. [citation omitted]. While the parties’ agreement would transfer to King County BNSF’s opportunity to provide rail service, it would not preclude *any other service provider* [emphasis supplied] from seeking Board authorization to restore active rail service on all or parts of the railbanked segments in the future if King County does not exercise its right to reinstate rail service.”

King County's refusal to work with GNP on service restoration makes a mockery of the authority the Board granted it. Nevertheless, there is no reason why the Board cannot grant GNP's operating authority request irrespective of King County's opposition and there is no reason that GNP as an existing freight common carrier railroad cannot initiate service over the Lines. It is currently providing service on the Freight Easement and has locomotives and rolling stock, commercial arrangements, crews, and insurance in place to permit it to extend service south of its current terminus at MP 23.8 on the Woodinville Subdivision.

King County further suggests that the Board has been very careful not to exercise its power to authorize a transaction when there is an underlying property or contract dispute if such authorization would prejudice a party with respect to the underlying dispute or there are substantial doubts regarding the ability of the petitioner to exercise Board authority. Id. In each of the cases that GNP cited at pages 8 and 9 of its Petition for Exemption the Board granted the short line applicants operating authority in the form of an exemption despite some dispute involving access to the property, possible prejudice, or doubts regarding the applicant's ability to exercise that authority. The only cases that King County cited here are two involving James Riffin and are clearly distinguishable. Unlike Mr. Riffin, GNP is a functioning, duly authorized rail freight common carrier and

is not some form of a ruse to obtain a federal preemption from the application of state or local law that is not otherwise warranted.

Several of GNP's opponents urge that to grant its Petition would somehow jeopardize the integrity of the rails-to-trails program and these Lines in particular.¹⁶ *See, e.g.*, King County at 43. GNP understands and is sensitive to the concerns of those stakeholders worried that the trail project could be jeopardized if GNP failed to initiate its proposed rail service or terminated such service at a later date. GNP believes these concerns are misplaced. Clearly, the Board could condition any grant of authority to GNP on a provision that the trail use would automatically be reactivated on any segment of the Lines over which GNP fails to start or terminates its service. Alternatively, GNP would support inclusion in any railroad operating agreement terms requiring the reactivation of the trail use should GNP fail to consummate or terminate rail service on any portion of the Lines. Payne VS at para. 20. Notwithstanding those concerns about the integrity of title to the right of

¹⁶ For example, Redmond suggests that vacating the NITU would cast doubt on the City's ability and the ability of others to make use of the corridor for planned recreational uses and other public projects for which tens of millions of dollars of public funds have been budgeted. Redmond comments at 18 and 19. King County worries that the land owners with reversionary claims to the right of way might seek to assert their title. *Id.* at 44, 5, and 48. Similarly, RTC and BNSF fear a ruling in GNP's favor would establish precedent that *could*, among other things, interfere with existing contractual arrangements between railroads and trail users, disrupt settled expectations of the parties to such arrangements, encourage "abusive" filings, undermine the effective implementation of the federal railbanking program, and put at risk "substantial" sums of money that parties have spent developing trails. BNSF comments at 9 and 10; RTC comments at 2, 8, and 9.

way, there is some question as to whether the property conveyed by BNSF to the Port and from the Port to Redmond is owned in fee or subject to reversionary easements. There is evidence indicating that BNSF held fee title. Payne VS at para. 26.

GNP does not seek to “expropriate” the property of any party. It has an existing arrangement in place with the Port to compensate that owner for the GNP’s use of the Freight Easement. It would be pleased to enter into reasonable compensation arrangements with the Port, Redmond, and other affected parties. GNP is agreeable to enter into meaningful negotiations with all of the stakeholders in this proceeding as King County seems to imply might be appropriate. King County at 59-60. But King County has rebuffed GNP in its efforts to engage the stakeholders in substantive discussions. Id. at 60. Payne VS at paras. 8-10; Bissonnette Deposition at 51:5-9.

The Board’s Petition for Exemption process is the appropriate licensing procedure. Despite King County and Redmond’s requests,¹⁷ there is no need for GNP to file a formal application for authority under section 10902. GNP has compared the contents of its Petition and the supplemental information submitted here against the Board’s regulations for formal applications and finds that it has provided virtually all of the pertinent information including financial information

¹⁷ King County at 56; Redmond at 36.

required for an application. *Compare, Ozark Mountain Railroad-Construction Exemption*, Finance Docket No. 32204, ICC slip op. served December 15, 1994 (where the Commission faulted the Petitioner for not providing financial information and ridership projections on a major railroad construction project).¹⁸

The Board frequently requires carriers to use the application format when seeking abandonment or discontinuance authority where substantial shipper or public agency opposition is expected or materializes. The stated reason for that policy is that the very tight statutory deadlines imposed on abandonments (a decision within 110 days of the date of filing) does not permit the Board to develop a full record on which to base its decision when abandonment is sought by an individual exemption petition. *See, e.g., San Pedro Operating Co., LLC – Abandonment Exemption – in Cochise County, AZ*, STB Docket No. AB-441 (Sub-No. 4X), STB served Sept. 15, 2005, slip op. and cases cited therein at 4 (“Typically, the types of abandonment and discontinuance proposals that are authorized through the exemption process are those where shippers do not contest the abandonment”). But that is not the case here.

¹⁸ King County and Redmond’s reliance on this case is misplaced as the facts there are totally different from those presented by GNP. Ozark Mountain involved the construction of 75 miles of new interstate railroad that appears to be solely for excursion passenger purposes. Projected to cost around \$310 million, the project presented significant environmental impacts and would involve substantial agency staff time and resources. By comparison, GNP’s proposal to restore service on the Lines entails roughly 9 miles of existing track at fairly nominal expense and little in the way of environmental impacts.

Alternatively, the Board has sometimes required carriers or noncarriers submitting controversial acquisition or operation proposals to utilize *either* the individual exemption procedures, as GNP has done, or a full application. The usual basis for requiring a full application is where there is a stated need for regulation. Case precedent holds that the opponents have the burden of showing that regulation is needed and indicating specifically the provisions of the ICCTA that regulation would satisfy. Minnesota Comm. Ry., Inc. – Trackage Exempt.-BN RR. Co., 8 I.C.C. 31, 35-7 (1991). This same standard applies to granting as well as revoking exemptions. Id. at 36. But no opponent has suggested that GNP's proposal does not meet the exemption criteria at 49 U.S.C. 10502 or indicated which of the ICCTA's rail transportation policy would not be fulfilled. Moreover, there is little doubt that GNP's proposal would meet both the limited scope and no abuse of captive shippers tests of 49 U.S.C. 10502(a)(2)(B) as this case involves about nine miles of railroad and several supporting shippers.

GNP's opponents have had the opportunity to take discovery of GNP or its shippers. One opponent, Redmond, has availed itself of that opportunity. Similarly, GNP's opponents have submitted very substantial comments with supporting testimony and exhibits. The cumulative pile of opposing submissions that GNP has received to date fill several file boxes. The Board has commenced a

proceeding to review and analyze all of these submissions with a decision expected in June 2011.

Parties opposing Board-issued exemptions frequently seek rejection or revocation and the handling of entry requests through formal application proceedings on the grounds that the exemption requests contain false and misleading information. King County and Redmond's assertions aside, GNP's petitions contain nothing false or misleading. As to the status of any agreement or access rights to the Lines, GNP has consistently represented that it does not own the right of way or presently hold the common carrier rights to reactivate service. Petition at 6-8, and 10. At pages 13 and 14 of the Petition entitled "Statement of Agreement," GNP stated "[i]t has been talking with King County representatives about restoration of common carrier rail service on the Line; however, the parties have not yet reached an agreement." Nothing could be more forthright.

King County and Redmond also accuse GNP of omitting from its Petition certain pertinent information. As GNP's opponents are undoubtedly aware, the Board's regulations for individual Petitions for Exemption do not prescribe any content requirements. 49 CFR 1121.3. This is in stark contrast to the provisions for both formal applications and the class exemptions applicable for entry authority. *Compare*, 49 CFR 1150.1 through 49 CFR 1150.11 *with* 49 CFR 1150.31 and 49 CFR 1150.41. But GNP has further provided in its Petition all of

the information that would have been required under the existing carrier line acquisition or operation class exemption provisions of 49 CFR 1150.41. Moreover, with the additional information supplied in these Reply Comments, GNP has effectively submitted virtually everything that would have been required had it filed a formal application. No public purpose would be served by requiring the filing of a full application.

Decisions cited by King County and Redmond such as Indiana and Ohio R.R. Co.-Constr. and Operation-Butler, Warren, and Hamilton Counties, OH, 9 I.C.C. 783 (1993) and Ozark Mountain R.R.-Constr. Exemption, ICC Finance Docket No. 32204, served Dec. 15, 1994 are distinguishable. These sixteen and seventeen year-old decisions involved construction, rather than acquisition and operation filings, and reflect the more pro-regulatory environment that prevailed prior to the enactment of the ICCTA. Contrary to the position taken by GNP's opponents, the Board *has* allowed the parties in controversial cases to seek authority by seeking an individual exemption. Riverview Trenton Railroad Company Petition for Exemption From 49 U.S.C. 10901 To Acquire and Operate a Rail Line in Wayne County, MI, STB Finance Docket No. 34040, STB slip op. served May 15, 2003 at 10-13.

Finally, King County and Redmond would have the Board deny this exemption claiming or inferring a "lack of public need" for GNP's service. King

County at 61-63 and Redmond at 26 and 36. The Board does not require Petitioners to demonstrate a public need for the proposed service. In so arguing, these opponents fail to recognize the changes in the public convenience and necessity test brought about by the Staggers Act amendment to the Interstate Commerce Act and the ICCTA. In Norfolk Southern Corp. and Norfolk Southern Ry Co. – Construction and Operation-in Indiana County, PA, STB Finance 33928, STB served May 16, 2003, slip op. at 3, the Board stated “[I]n enacting the ICC Termination Act of 1995..., Congress intended to facilitate rail construction. Congress did so by changing the statutory standard from requiring approval if the agency finds that a project is consistent with the public convenience and necessity (PC&N) to requiring approval unless the agency finds that the project is inconsistent with the PC&N.”). In short, the law *requires* [emphasis supplied]the Board to grant GNP an exemption and places the burden of proof on parties such as King County and Redmond opposing the exemption. Minnesota, *supra*, at 36.

The Board does not impose a “fitness” test on petitioners seeking railroad entry licenses. But even if it did, GNP would pass that test with flying colors. Before addressing concerns voiced by GNP’s public agency opponents, GNP wishes to clarify its motivation for seeking Board authority. Large and permanent potential freight demand has emerged since the commencement of operations on the Freight Easement. GNP’s principal consideration has always been common

carrier freight service; any passenger service makes a contribution to fixed costs and operating overhead. GNP also recognizes that applicable Federal Law is accompanied by some state and local regulation. Where applicable, GNP acknowledges and respects the requirement that it comply with state and local agencies of competent jurisdiction. To the extent that its officers may have made statements that were misinterpreted or misunderstood otherwise, GNP hereby corrects the record. Payne VS at para. 25. GNP will, as a good corporate citizen and as it does with many public agencies and jurisdictions today, work harmoniously with the Port, King County, the City of Redmond, and Sound Transit to resolve their objections and minimize conflicts.

In their unrealistic quest to find the “ideal railroad” operator (if, indeed, it exists), King County and Redmond challenge the “viability” of GNP’s proposal in three respects: 1) GNP is undercapitalized, 2) GNP’s traffic projections lack credibility, and 3) the track conditions are inadequate for the service proposed. GNP offers argument and testimony to show that these assertions are dead wrong.

Insofar as the Port and Redmond own the portions of the Lines, there is no reason for GNP to acquire them because they would be operated and compensated in a manner similar to that currently in effect between GNP and the Port. GNP is prepared to pay fair value for its use of a rail transportation easement and its financial statements include reasonable compensation.

GNP has sufficient financial resources to carry out its plan. As GNP has refocused its plan on providing common carrier freight service, it has revised its financial projections accordingly. Although GNP had said at one time that the amount of on-line freight traffic on the Freight Easement was too marginal to support a profitable operation, substantial development work has shown such earlier predictions to be overly pessimistic. Payne VS at paras. 4-6 and 12-16.

The financial responsibility standard articulated by King County and Redmond appears to be a moving target as neither party has specified what it expects of GNP or any other putative freight carrier for that matter. Accordingly, GNP will rely on the two models commonly used by the Board for determining the financial “fitness” of a railroad seeking to forcibly acquire and operate a rail line. They are the same two standards of “financial responsibility” employed by the agency in judging offers of financial assistance under the Board’s abandonment statute at 49 U.S.C. 10904 and evaluating feeder applications under the Feeder Rail program at 49 U.S.C. 10910.

Both provisions envision that the offeror has sufficient funds available to it, however derived or obtained, to acquire the line,¹⁹ rehabilitate it to an adequate standard for rail freight service, and to operate the line for a statutory minimum

¹⁹ The usual standard under 49 U.S.C. 10904 is the net liquidation value (NLV) of the line. Under 49 U.S.C. 10910, it is the higher of NLV or the going concern value of the line.

period (two years under 49 U.S.C. 10904, three years under 49 U.S.C. 10910). Typically such offerors will submit evidence of their ability to fund the acquisition cost, operating expenses, and any rehabilitation needs through bank statements, bank lines or letters of credit, or commitments by qualified and known investors. To establish that GNP is financially qualified to operate all 9.3 miles of railroad at issue here, it submits under seal a highly confidential memorandum of understanding from a prominent local investor in the Pacific Northwest.²⁰ Exhibit H. GNP also provides under seal confidential *pro forma* financial statements for the first five years of operations and the verified statement from its outside consultant Robert Finley explaining these statements. Exhibit K.

The intentions of GNP's supporting shippers. The Board should recognize the King County-Redmond challenge to GNP's customer base for what it is: another attempt to avoid their statutory responsibility to accommodate reactivation of rail service. These two parties variously attack the credibility of GNP's shipper support as, depending upon the specific shipper, 1) the customer made very limited use of BNSF's former service, 2) the numbers of cars to be shipped or received are insufficient to make the Lines profitable, 3) the customer has not asked GNP or BNSF for rates, 4) has never used rail service before, 5) has not signed any

²⁰ That document will be submitted separately and will only be available to the Board and to outside counsel and consultants of the opposition parties executing an appropriate undertaking.

enforceable contracts or commitments for using GNP's rail service, 6) was first approached for its traffic by GNP rather than the other way around, 7) lacks a siding on the Lines, and/or 8) is located on the Freight Easement and not the Lines.

Most, if not all of these challenges either mischaracterize the evidence or are factually wrong. GNP's shipper supporters clearly demonstrate a *bona fide* intent to utilize freight rail.

(a) Randy Mann/ Building Specialties Inc.

Building Specialties' Redmond, WA Center Manager Randy Mann testified to having amassed 30 plus years of service with his employer, the past 7 years in his current position. See, King County Exhibit 46, transcript of Randy Mann's October 26, 2010 deposition given in this proceeding, (hereafter, Mann dep.) at P.7, L.13 and Mann July 8, 2010 Support Letter.

Mr. Mann testified that one of the reasons Building Specialties, Inc. (BSI), a former BNSF customer located on an existing industrial siding off the Redmond Spur, stopped using rail service was because of declining frequency of service (from daily to three days a week to ultimately two days per week) and a concomitant rise in demurrage costs. (Mann dep. at P.27, L.9-15.) At around the same time, US Gypsum, a BSI supplier, opened a non-rail served Rainier, WA plant, forcing BSI to use motor carrier service for product supply. (Mann dep. at

P.28, L.21-P.29, L.2.) Mr. Mann reports that the Rainier plant has since gained rail access, and that BSI stands to realize potential cost savings of \$945 to \$1,080 per rail car compared to a comparable quantity of product delivered by truck. (Mann dep. at P.84, L.16-19.) Contrary to the County's assertions at page 33, lines 17-18 of their Comments, Mr. Mann enthusiastically and clearly concludes that being able to switch back to rail definitely provides BSI with a benefit (emphasis supplied), in terms of cost savings (Mann dep. at P.93, L.1-15), as well as lessening time pressure when unloading rail cars as opposed to trucks. (Mann dep. at P.60, L.15-20.) Nor is it clear what would represent, in the County's mind, "a firm statement of actual need" (County Comments at p. 33, l. 20-21); Mr. Mann's estimate that BSI would receive 40 cars per year appears reasonable given the current slump in the construction materials supply industry; but can also be viewed as conservative when compared with past BSI shipping patterns. In point of fact, BNSF records indicate BSI received up to 290 cars per year as recently as 2000. See, King County Exhibit 35, Verified Statement of Susan Odom at Paragraph 5 thereof.

(b) Scott McDonald/ Drywall Distributors, Inc.

Drywall Distributors, Inc. (DDI) is BSI's neighbor along the Redmond Spur in Woodinville, WA as well as a fellow member of the construction materials

supply industry. Like Mr. Mann, Scott McDonald's October 26, 2010 deposition testimony undergoes a thorough scrubbing at the hands of GNP's opponents.

Mr. McDonald, the current owner of DDI, offers a strong factual basis for his interest in receiving rail service. His business is at a competitive disadvantage during strong demand periods, such as from 2006 through 2008, when local suppliers placed DDI on product rationing due to lack of rail service, a situation which could have been alleviated had rail service been available. See, King County Exhibit 47, transcript of Deposition of Scott McDonald given in this proceeding (hereafter, McDonald dep.) at P.23, L.20 – P. 24, L.3. Concerning his rail freight delivery needs, Mr. McDonald unambiguously states, "I feel pretty comfortable that I could do 40 cars [per year]." (McDonald dep. at P.27, L.12-19.) Additionally, National Gypsum one of DDI's suppliers is locating a new plant near Phoenix, AZ, and Mr. McDonald reports they are interested in rail service. (McDonald dep. at P.30, L.14-16.) Another supplier, US Gypsum, wanted to ship product to DDI by rail from Charlotte, NC in Spring 2010, but was, of course, prevented from doing so by the absence of rail service on the Redmond Spur. (McDonald dep. at P.31, L.4-9.) Georgia Pacific and CertainTeed are other DDI suppliers who could deliver by rail. (McDonald dep. at P.32, L.23 – P.33, L.6.)

The deponent, without getting into specifics for proprietary reasons, also indicated that DDI, with rail service, would pursue the prospect of shipping

material by rail out to certain larger customers. (McDonald dep. at P.34, L.11-14 and P.35, L.1-3.)

Mr. McDonald frankly acknowledged that the current nationwide economic slump has negatively impacted DDI's immediate need for rail service (McDonald dep. at P.70, L. 19 – P. 71, L.3) bears no relation to DDI's long term need for rail service, notwithstanding King County's contrary assertions at p. 33, l. 11-13 of their Comments.

Mr. McDonald expressed his considerable enthusiasm for freight rail, "I would love to have the opportunity for rail freight. It gives me added flexibility, potentially." (McDonald dep. at P.51, L.7-9.)

With regard to rail freight cost, Mr. McDonald recalls that in the 1990's using rail instead of truck saved \$10 to \$15 dollars per 1,000 feet of product. (McDonald dep. at P.54, L.21-23.)

With regard to GNP installing a siding at this facility, where DDI is currently a tenant, Mr. McDonald indicated DDI would be willing, under certain circumstances, to pay a portion of the construction cost. (McDonald dep. at P.48, L.17-21.)

Clearly, the availability of rail provides these customers with additional sources for inbound traffic or outbound products than they would otherwise not have.

GNP has reviewed agency precedent in terms of the type of shipper support typically required to establish a public need for the rail line. In that regard, GNP found the most useful precedent to be in the area of rail line abandonments, particularly “adverse abandonments.” Furthermore, GNP notes that in many of the fairly recent adverse abandonment cases the Board has repeatedly stated that it is mindful of Congress’ intent as expressed in many statutory provisions that lines be kept within the rail system where possible. Norfolk S. RY. CO., - Adverse Abandonment – St. Joseph County, IN, STB Docket No. AB-290 (Sub-No. 286), STB served Feb. 14, 2008, slip op. at 5-6. That philosophy is entirely consistent with the policy of the Trails Act that requires reactivation upon a showing of a public need for rail service.

The Board has not required railroad applicants or their potential shippers to furnish executed transportation contracts or commitments or even rate quotations as evidence of a need for rail service. For example, in Yakima Interurban Lines Association—Adverse Abandonment—in Yakima County, WA, STB Docket No. AB-600, STB slip. op. served Nov. 19, 2004, the Board denied the adverse abandonment of an inactive rail line on the basis of several verified one-page

shipper signed “petitions” containing far less information than the sworn customer statements and letters submitted here.²¹ Similarly, in The Chicago Lake Shore and South Bend Railway Company–Acquisition and Operation Exemption–Norfolk Southern Railway Company, STB Finance Docket No. 34960, STB served February 14, 2008, *aff’d sub. nom.*, The City of South Bend IN v. the Surface Transportation Board, 566 F.3d 1166 (D.C. Cir. 2009)(hereafter cited as South Bend), the Board relied on the short line applicant’s representation of potential rail traffic that had years before been diverted to truck transportation to make a finding of a public need sufficient to defeat the adverse abandonment application. In Riverview Trenton discussed at page 27, *infra*, the Board found that shipper form letters were a sufficient statement of public need for rail service. *Id.* at 11.

Nevertheless, GNP went back to several of these supporting customers to obtain a reaffirmation of their support and need for the service by signing commitments to use GNP’s service conditioned upon GNP being able to commence operations and get access to the Lines. John Snow and Matt Surowiecki both admit to approaching GNP first, both admit to long experience in the rail shipping industry, and Surowiecki guaranteed that Steeler would take a minimum of 120 cars per year. *See*, GNP Reply Exhibit J, Verified Statement of John Snow, Jr. and GNP Reply Exhibit I, Verified Statement of Matt Surowiecki,

²¹ Shippers located on the ROW have stated that they would use rail service if restored. Slip op. at 5.

Jr. GNP fully admits having solicited some of the customers for traffic, other customers that approached GNP. Id. King County's and Redmond's criticisms aside, customer solicitation of new and "dormant" railroad customers is a standard short line industry business practice. Payne VS at para. 5 and Finley VS at 6.

The fact that several of GNP's potential shippers currently lack a rail siding or gave up that rail siding does not detract from their need for rail service. For example, in Seminole Gulf Railway, L.P.—Adverse Abandonment—In Lee County, FL, STB Docket No. AB-400 (Sub-No. 4), STB served November 18, 2004, the Board denied the adverse abandonment of a rail line based upon traffic from customers lacking sidings and loading or unloading traffic along a public road (an electric utility and a circus train) as well as assertions (not contracts or commitments) of future traffic from potential shippers. Though several of these customers are currently using truck to meet their transportation needs and the availability of rail service would constrain their truckers' ability to raise rates, the fact is that these customers are *shipping* by one mode or another and are therefore to be recognized as legitimate supporters. South Bend, *supra*.²²

²² King County and Redmond cite to Roaring Fork-Exem-In Garfield, Eagle & Pitkin Counties, CO, 4 S.T.B. 116, 120 (1999), for the proposition that the Board will not order a line authorized for abandonment to be conveyed under 49 U.S.C. 10904 for continued rail use in the absence of strong and convincing shipper support. The question was not whether the supporting shippers had made commitments or signed contracts with the proposed railroad for moving freight. Rather the Board found that three of the five shippers were not in a position to use the line. One shipper had moved to a location off the line. Another was located on the other side of

Lastly, the fact that the *initial* carloadings may be modest adds little to the strength of the protests. GNP witness Payne discusses in his statement the factors that led customers such as Building Products to reduce its use of rail during the time period between 2000 and the abandonment of the Lines in 2008. Payne VS at para. 22. A start up short line is in the nature of a business turnaround. Most startup businesses do not commence operations with a full “book of business” on day one. A short line railroad is no different. The fact is that not only does Tom Payne have a demonstrated record of restoring declining rail lines to health (Payne VS at para. 23), GNP has sufficient cash and anticipated receivables from substantial customers on the Freight Easement that it can afford the business risk of operating the Lines until the service becomes truly profitable in its own right. Finley VS at 3-4.

The physical condition of the track and the Lines. The Board should recognize as another nonstarter suggestions by King County and Redmond that the track requires substantial rehabilitation before it can be used. The Board has stated

a waterway and the cost of constructing a siding and a bridge to serve its location was found impractical for its low traffic levels. Another customer was located some distance away on right of way that had long been abandoned. The Board characterized the traffic levels from the remaining two customers as too indefinite and insufficient to support continued service. This case is inapposite.

time and time again in its abandonment decisions²³ that FRA class one track is the *appropriate* minimally acceptable standard for freight traffic. Accordingly, GNP engaged Read Fay, the former General Director of Transportation for the Seattle Division of BNSF, to inspect the track, bridges, and other facilities on the Lines to determine what repairs would be needed so that GNP could initiate freight service promptly. Payne VS at para. 17 and Exhibit L, Fay VS, and Exhibit M, Faye Inspection Report. Mr. Fay's inspection determined that the Lines are presently in either FRA class one condition or FRA "excepted" class (which are both acceptable for slow speed freight service). Fay VS at 4 and the Inspection Report at 2.

GNP on 26 August 2010 received a quotation for the scope of work required from RAILWORKS Track Systems, a nationally recognized rail contractor who currently performs work for Sound Transit and other regional railways in the Seattle Area. The estimated labor and material cost of the immediate repairs to restore the lines on the Redmond Spur to excepted class of service is \$_____, and could be accomplished in one month. The incremental cost of improving the line from excepted class track to Class I

²³ Union Pacific Railroad Company--Abandonment--In Lancaster and Gage Counties, NE and Marshall County, KS, STB Docket No. AB-33 (Sub-No. 140), STB served December 17, 1999 at slip op. at 5-6.

status would be \$_____ and could be accomplished with a further month's work. *See*, RAILWORKS Track System labor quotation, annexed hereto as Exhibit N. *See* Harmer Steel Product tie quotation, annexed hereto as Exhibit O.

In short, GNP is "fit", financially and otherwise, to assume the burdens and responsibilities of being the rail carrier that can reactivate service on the Lines.

King County Possesses Neither the Ability nor the Actual Intent to Execute Its Responsibilities under the Trails Act, the Transaction Agreements or the Common Carrier Obligations.

Paradoxically, the Interlocal Agreement, at Page One thereof, expressly prohibits interstate freight service as a use of the property. This prohibition must be disregarded as conflicting with the Parties' obligations under the Railbanking Legislation, collectively defined in the Trail Use Agreement, *infra* as 49 C.F.R. 1152.29 and 16 U.S.C. 1247(d).

Possessing neither rail nor freight divisions within its Transportation Department (See, GNP Reply Exhibit G, transcript of the December 1, 2010 deposition of King County Executive Project Manager Pam Bissonnette at P.52, L.13-17 [hereafter, Bissonnette dep.]), King County appears exceptionally ill-suited for an entity holding either or both freight reactivation authority or a common carrier obligation; lacking as it does any rail staff, rail budget or rail plan.

Although she is the King County Executive's principal representative charged with administering the Eastside Rail Corridor redevelopment project, Ms. Bissonnette has no working knowledge of either the common carrier obligation (Bissonnette dep. at P.33, L.16-22), or King County's current status as holder of those obligations. (Bissonnette dep. at P.33, L.23-P.34, L.1.). At her deposition she had to rely on her legal counsel for guidance regarding King County's reactivation responsibilities. (Bissonnette dep. at P.33, L.11.). Consistent with her other testimony, King County's witness had no working knowledge of the transaction Agreements, for example the MPE (Bissonnette dep. at P.42, L.25-P.43, L.2.), the Interlocal Agreement (Bissonnette dep. at P.53, L.10-11.), or King County's reactivation obligations under the Trail Use Agreement (Bissonnette dep. at P.55, L.1-15.).

Nor could King County articulate a plan for responding to a shipper request for service over the Railbanked Lines, should such a request be made. (Bissonnette dep. at P.56, L.5-17.). King County has yet to even define its rail planning process. (Bissonnette dep. at P.32, L.4-5.). The Eastside Rail Corridor Project Manager told the City of Kirkland, WA that "King County doesn't do rail" (Bissonnette dep. at P.32, L.13.), including, of course, freight rail. (Bissonnette dep. at P.32, L.21.).

Read as a whole, King County's professed lack of knowledge concerning its interim trail user obligations, its obligation to cooperate with a reactivation request, and its common carrier obligations is disturbing to say the least. GNP is well within bounds to question whether King County truly understood what it was undertaking with regard to these Lines, or worse, whether King County knew but doesn't care about those obligations. In either case, the purposes of the railbanking provisions of the Trails Act are being thwarted by King County and the other public agency parties to this proceeding.

GNP is ready, willing, and able to address the concerns of Sound Transit.

The nub of Sound Transit's opposition is that it wishes to utilize a small portion of the right of way (but not the track thereon) of the Redmond Spur in the vicinity of 161st Avenue in downtown Redmond for a light rail line known as the "East Link" project and is understandably concerned about any potential for injury to its employees or passengers stemming from GNP's operations in this corridor. Sound Transit at 3-5 and 8. It is to be noted that Sound Transit lacks voter authorization or funding to construct East Link into downtown Redmond, and the earliest that they are scheduled to seek that vote will be 2023. While Sound Transit also expresses a desire to use a one-mile portion of the Woodinville Subdivision located between MP 12.4 and 13.5, it is clear to point out that this trackage is 8 miles south of the GNP's proposed terminus on that line. Id. at 3-4. Furthermore, Sound

Transit makes clear it has deferred proceeding with any commuter rail project on the Woodinville Subdivision due to the current recession. Id. at 3. Some of the other concerns identified by Sound Transit such as compensation for use of track and right-of-way (which Sound Transit does not currently own) and federal jurisdiction over intrastate passenger service are also nonissues as GNP is agreeable to paying for the track and right of way it would utilize.

Simply stated, GNP would welcome the opportunity to sit down with Sound Transit to address and resolve its concerns regarding any shared use of the Lines and any other corridors the two entities might share in the future. This discussion can include insurance coverage, indemnification, and other issues of mutual concern. GNP would also be pleased to try to give Sound Transit comfort with its financial resources, business plan, and management team.

The Georgia Great Southern case. Several parties, most notably Redmond, have criticized GNP's reliance on Georgia Great Southern-Aband. & Discon. Of Service-GA²⁴ as supporting its acquisition proposal. GNP had merely cited that case for the proposition that the railroad had the right to restore service on a line that had been authorized for abandonment and subsequently conveyed for trail use irrespective of any need for reasonable compensation to be paid by the reactivating railroad or the existence of any mechanism for setting compensation. Concluding

²⁴ 6 S.T.B. 902 (2003).

that Congress intended to leave compensation matters to the parties to resolve through negotiation or litigation outside Board jurisdiction, the Board stated emphatically that “a satisfactory resolution of such compensation issues cannot be a precondition to restoration of rail service, as the statute gives the railroad the right to restore rail service at any time.” Id. at 906-8.

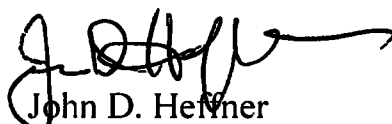
Redmond criticized Georgia Great Southern as a “shortsighted decision.” Redmond at 44. If Redmond had its own way, it would delete the word “interim” and substitute the word “perpetual” before “trail use.” But it is the law and GNP can rely on it. While GNP concedes that the short line carrier there did have the legal right to reactivate service, the factual situation was a little more complicated than the Protestants admit.²⁵ But the fact remains that the Board authorized reactivation over the opposition of the trail user and left the compensation arrangements for the parties to resolve.

²⁵ The carrier seeking to reactivate was *not* the original abandoning carrier. Rather a carrier identified here as Railroad A (in reality known as the Georgia Great Southern Division of the South Carolina Central Railroad) originally obtained an exemption to allow it to abandon a rail line. Subsequently, railroad A’s corporate parent transferred that line and other lines from railroad A to railroad B, a newly formed noncarrier subsidiary (in reality Georgia Southwestern Railroad). Railroad A then negotiated a trail use agreement with the initial trail user. Railroad A then reacquired all of Railroad B’s lines and leased them back to Railroad B. Thereafter, another railroad holding company bought control of the first railroad holding company and sold the stock of Railroad B to the management team that sought to reactivate the railroad.

CONCLUSION

For the above stated reasons and based upon the above-cited authorities, GNP requests that the Board grant its Petition for Exemption to enable it to acquire the residual common carrier rights and obligations and reinstitute common carrier rail service on the Lines. GNP also asks the Board to grant the Petitions to Vacate (or Partially Vacate) trail use filed in the above-captioned two abandonment proceedings to allow the reactivation of rail service over the Lines at such time as it is ready to commence the freight rail service proposed here.

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